91-1487

No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BROADCAST MUSIC, INC., *et al.*,

Petitioners,

v.

CLAIRE'S BOUTIQUES, INC.,
d/b/a CLAIRE'S BOUTIQUES,
and d/b/a ARCADIA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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March 10, 1992

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QUESTIONS PRESENTED

Section 110(5) of the Copyright Act provides a limited exemption from copyright infringement liability for the public reception of a transmission of a copyrighted work (*e.g.*, a radio broadcast) on a single receiving apparatus of a kind commonly used in private homes where no direct charge is made and the transmission is not further transmitted to the public.

At issue in this petition is whether the United States Court of Appeals for the Seventh Circuit erred by holding that Section 110(5) exempts a national corporation which systematically purchases and professionally installs multi-speaker equipment at 669 stores, and who further transmits radio broadcasts of copyrighted works to the public from one room to another room. The specific questions raised by the Court's decision and this petition are:

1. Whether the Seventh Circuit erred by imposing on the copyright owner the new burdens of proving that the Section 110(5) exemption does not apply by showing that the alleged infringer is acting like a broadcaster and receives more than a minimal benefit from the infringing activity;

2. Whether the Seventh Circuit erred by judicially broadening Section 110(5) to exempt a person's use of more than a "single receiving apparatus" by analyzing the use of each receiving apparatus in isolation rather than in the aggregate, and by ignoring all precedent and Congressional intent to limit the exemption to small businesses; and

3. Whether the Seventh Circuit erred by rejecting all precedent and interpreting the "further transmission" language of Section 110(5) as depending upon the receiver's capabilities instead of the alleged infringer's use of the transmission after it is initially received.

PARTIES TO THE PROCEEDINGS

Broadcast Music, Inc., and the following songwriters and music publishers that it represents, are all Petitioners in this Court:

Virgin Songs, Inc.;
Irving Music, Inc.;
Stone Agate Music, Division of Jobete Music Co., Inc.;
Michael Joe Jackson d/b/a Mijac Music;
Dick Griffey d/b/a Hip Trip Music Co.;
Kear Music, a division of La Face, Inc.;
Hidden Pun Music, Inc.;
Neal Schon, Gregg Rolie, Ross Valory, Aynsley Dunbar, a Partnership d/b/a Weed High Nightmare Music;
Foreign Imported Productions and Publishing Inc.;
Aurora Productions, Inc., James L. Stewart and Richard H. Irvine d/b/a Aurora Film Partners Music;
John Cafferty, Jr., d/b/a John Cafferty Music;
Man Woman Together Now Inc.;
Bonnie Bourne d/b/a Murbo Music Publishing;
Dick James Music, Inc.;
Screen Gems-EMI Music, Inc.;
Michael Jackson d/b/a Maclen Music;
Richcar Music Corp.;
Samuel J. LeFrak as individual and trustee, Ethel LeFrak as individual trustee, Richard S. Lefrak, Samuel J. LeFrak as individual, Francine LeFrak and Herbert Moelis, a Partnership d/b/a Saja Music Company;
Stevie Hill d/b/a Myat Publishing;
Unichappell Music, Inc.;
Felice Bryant d/b/a House of Bryant Publications;
S.K. Music, L.P. and Fujipacific Music (USA), Inc. a Joint Venture known as Windswept Pacific Entertainment Co. and d/b/a Longitude Music Co.;
Warner-Tamerlane Publishing Corp.;
Chevis Publishing Corp.;
Al Gallico Music Corporation (EMI Al Gallico Music Corp.);
Pink Floyd Music Publishers, Inc.;
Bill Graham d/b/a Grajonca Music (Estate of Bill Graham);

PRI Songs, Inc.;
Anita Pointer d/b/a Anita Pointer Publishing;
EMI Blackwood Music Inc.;
Richard Perry d/b/a Braintree Music;
June Pointer Whitmore d/b/a Leggs Four Publishing;
Ruth Pointer d/b/a Ruth Pointer Publishing;
Trevor Lawrence d/b/a Til Dawn Music;
EMI Unart Catalog, Inc.;
Ensign Music Corporation;
Sebanine Music, Inc. (Budde Songs, Inc.);
Shannon Rubicam and George Robert Merrill, a Partnership d/b/a Boy Meets Girl Music;
Al Green Music, Inc.;
Kim Wilson, Jimmie Lawrence Vaughan, Francis Anthony Christina, Preston Hubbard, a Partnership d/b/a FAB Bird Music;
Towser Tunes, Inc.;
ABKCO Music, Inc.;
Careers Music, Inc. (Careers-BMG Music Publishing, Inc.);
Melody Trails, Inc.;
Derringer Music, Inc.;
Jay Ferguson d/b/a Painless Music;
Alley Music Corp.;
Trio Music, Inc.;
Wheatley Management Services d/b/a American Tumbleweed Music;
Conrad Music, a division of ARC Music Corp.;
Warren T. Parker, Jr., George R. Davis, Jr. and Alvin O. Tyler, a Partnership d/b/a OLRAP Publishing Co.;
Mick Fleetwood, John McVie, Christine McVie, a Partnership d/b/a Fleetwood Mac Music (NEM Entertainment Corp. d/b/a Fleetwood Mac Music);
Martha Emily Davis d/b/a Clean Sheets Music;
Muscle Shoals Sound Publishing Co., Inc.;
Jondora Music;
Vince Neil Wharton, Nikki Sixx, Robert Deal and Tommy Bass, a Partnership d/b/a Motley Crue Music Company;
Nikki Sixx d/b/a Sikki Nixx Music;

Mick Mars d/b/a Mick Mars Music;
Frederick S. Bienstock, Hammerstein Music & Theatre Company, Inc., Dorothy F. Rodgers, and Murray Cohen as Trustees under Dorothy F. Rogers 1983 Trust Agreement, a Connecticut partnership d/b/a Edward B. Marks Music Company;
Daryl Hall and John Oates, a Partnership d/b/a HOT-CHA Music Co.;
Island Music, Inc.;
Dean Esposito a/k/a Dino Esposito d/b/a ONID Music;
Blackbyrd Productions, Inc. d/b/a Blackbyrd Music; Saturday Music, Inc.;
Robert Gaudio and Frankie Valli, a Partnership d/b/a Seasons Four Music.

Petitioner Broadcast Music, Inc. has no parent companies, but the following are parent companies of one or more of the other Petitioners:

Virgin Music, Inc.;
Virgin Holdings, Inc.;
Stone Diamond Music Corp.;
Jobete Music Co., Inc.;
Motown Record Co.;
Polygram Leisure Ltd.;
Polygram Corp.;
Songs of Polygram International, Inc.;
Polygram N.V.;
EMI Technology, Inc.;
Thorn EMI plc.;
Capital Industries-EMI Music, Inc.;
Thorn EMI North American Holdings;
Warner-Chappell Music, Inc.;
Warner Bros. Inc.;
Time Warner, Inc.;
EMI Copyright Holdings, Inc.;
Pink Floyd Music Publishers, Ltd.;
Polygram Records, Inc.;
Catparco, Ltd.;
Entertainment World Music, Inc.;

Screen Gems-EMI Music, Inc.;
Paramount Communications, Inc.;
Jastian Music, Inc.;
ABKCO Industries, Inc.;
BMG Songs, Inc.;
Bertelsmann Music Group;
Bertelsmann, Inc.;
Anglo-American Music Holding Corp. Hit & Run Music Publishing Ltd.

Petitioners have no subsidiaries.

Claire's Boutiques, Inc. d/b/a Claire's Boutiques and d/b/a Arcadia is the Respondent in this Court. Respondent's parent corporation is Claire's Stores, Inc. and Respondent has no subsidiaries.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Broadcast Music, Inc., et al., respectfully request that a writ of certiorari issue to review the judgment in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 949 F.2d 1482 and is reprinted at Appendix ("App.") A to this Petition. The opinion of the Northern District Court of Illinois is published at 754 F. Supp. 1324 and is reprinted at App. B.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on December 11, 1991. App. C.

This Court has jurisdiction to review by writ of certiorari the judgment of the Seventh Circuit under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

STATUTE INVOLVED

The statute involved is the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq*. The relevant portions of the statute are set forth below.

17 U.S.C. § 101:

To perform or display a work "publicly" means—

> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

. . . .

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

17 U.S.C. § 106(4):

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive right to do and to authorize any of the following:

. . . .

> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.

17 U.S.C. § 110(5):

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

. . . .

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public.

17 U.S.C. § 501(a):

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 . . . is an infringer of the copyright.

STATEMENT OF THE CASE

Petitioners are songwriters and music publishers who create, publish and, together with their performing rights licensing representative, Broadcast Music, Inc. ("BMI"), license musical works covered by the Copyright Act. The Petitioners' musical works are being systematically exploited by Claire's Boutiques, Inc. ("Claire's"), a national chain of retail stores. Claire's plays BMI songs over loudspeakers in its 669 stores, but refuses to obtain permission to publicly perform and to pay a license fee for such use.

This action is representative of the problem Petitioners potentially face with more than 70,000 chain store operations in the United States. U.S. Dept. of Commerce, *1987 Census of Retail Trade: Establishment and Firm Size* 1-52 (1990). Although the potential license fees from an individual chain store operation is modest (thousands of dollars), the aggregate revenue lost by creators of musical compositions and their publishers could be very substantial (millions of dollars).

Petitioners filed this case in the United States District Court for the Northern District of Illinois against Claire's, alleging eighty-eight counts of copyright infringement. Jurisdiction resided in the District Court pursuant to 28 U.S.C. § 1338(a) because this action arose under the Copyright Act.

This case was presented to the District Court on cross-motions for summary judgment and stipulated facts (App. D and E). Claire's admitted that its activities were infringing if not exempt under Section 110(5). Claire's moved for a finding that its activities were exempt from liability under Section 110(5) and BMI moved for a finding of copyright infringement liability. BMI argued that the Section 110(5) exemption is limited to the operation of a single home-type receiving apparatus by a small business establishment, reflected by the statute, legislative history, and over 10 years of consistent precedent, and does not apply to the use of hundreds of receiving apparatuses by multimillion dollar chain store operations like Claire's.

The District Court granted Claire's motion for summary judgment on December 28, 1990, holding that Claire's is exempt under Section 110(5) from liability for its infringing performances. The District Court denied BMI's cross-motion for summary judgment of infringement liability and dismissed BMI's complaint.

BMI timely appealed the District Court's decision to the Seventh Circuit Court of Appeals. The Seventh Circuit rejected BMI's contentions, finding that (1) despite the legislative history of Section 110(5), the exemption is not limited to small businesses, (2) the phrase "single receiving apparatus" was used by Congress to refer to a single geographic site (thereby permitting a chain store owner to qualify for the exemption), and (3) contrary to precedent, the transmission of a performance from radio receivers in one room to loudspeakers in another, does not constitute "further transmission" of the performance under Section 110(5). On December 11, 1991, the Seventh Circuit affirmed the District Court's decision.

The facts of this case are not in dispute.

1. The Parties.

The Petitioners are (i) the owners of the copyrights in the eighty-eight musical compositions that are the subject of this action and (ii) BMI. (App. 52a, ¶ 8) BMI operates as a non-profit performing rights organization (App. 51a, ¶ 3) expressly recognized under the Copyright Act at 17 U.S.C. § 116(e)(3). BMI has been granted the non-exclusive right to license public performance rights in over one million copyrighted musical compositions, including those involved here. (App. 51a, ¶ 2)

Claire's is a wholly owned subsidiary of Claire's Stores, Inc. (App. 55a, ¶ 1) Claire's owns and operates 719 stores known as "Claire's Boutiques" and 30 stores known as "Arcadia." (App. 55a, ¶ 2) During fiscal year 1990, Claire's had net sales of $168,674,000 and earned $13,402,000 in net income. (App. 56a, ¶ 7)

2. Claire's Use Of BMI Music.

Claire's stores receive radio broadcasts and play them over remote, recessed speakers during all hours they are open. (App. 52a-53a, ¶¶ 9, 13, 14, 15, 17) Claire's stores are open to the public during their normal business hours, and audibly play radio broadcasts over speakers in the sales area during such hours of operation. (App. 52a, ¶ 7) Since there are 23 Claire's Boutiques stores in the Chicago area, it is likely that at least some play the same radio station simultaneously. (App. 57a, ¶ 10)

Claire's has stipulated that on the occasions identified in the complaint, the radio broadcasts it played over the speakers in its stores included the eighty-eight BMI copyrighted musical works at issue. (App. 53a, ¶ 16)

Claire's Arcadia stores division subscribed to a commercial background music service prior to its acquisition by Claire's and for six months thereafter. In addition, 24 Claire's Boutiques stores had a trial subscription to a commercial background music service. (App. 58a, ¶ 19)

3. Claire's Sound Systems.

Claire's owns and operates at least 669 radio receivers and 1,338 speakers as part of the sound systems used at its stores. (App. 58a, ¶ 20)

The receiver at each Claire's store is kept on a shelf in a storage room. (App. 57a, ¶¶ 13, 14) The storage room at Claire's stores is separated from the selling area by a floor-to-ceiling partition wall that runs from one end of the store to the other end (approximately 20 stores have a closet instead of a storage room).[1] These areas are not open to the public. (App. 57a, ¶ 13)

The speakers at Claire's stores are placed only in the public selling area, not in the private rooms where the receivers are located. (App. 57a-58a, ¶¶ 13, 15) One speaker is typically 5-15 feet from the receiver and the other is placed at a 20-35 foot distance. (App. 58a, ¶ 17)

4. BMI's Copyrights.

Claire's recognizes that the copyrights to the musical compositions at issue are valid and enforceable. (App. 52a, ¶ 10) In addition, Claire's recognizes that BMI has been granted the (non-exclusive) right to license the public performance rights in these compositions. (App. 53a, ¶ 11) Claire's has stipulated that its activities alleged in BMI's complaint occurred as alleged, subject only to Claire's assertion that these activities are and were exempt pursuant to 17 U.S.C. § 110(5) (and to certain other defenses not relevant here). (App. 53a, ¶ 16)

REASONS FOR GRANTING THE WRIT

Petitioners respectfully request that this Court grant a writ of certiorari to review the decision of the Seventh Circuit in this case in order to:

Resolve the conflict among the various district courts and between the Second and Ninth Circuits on the one hand, and

[1]Some stores that are still in the remodelling stage keep the receiver behind a "cash-wrap" counter. (App. 58a, ¶ 18)

the Seventh and Eighth Circuits on the other, over the proper construction of the Section 110(5) exemption;[2]

Restore the meaning of the statutory language of Section 110(5) of the Copyright Act to what Congress enacted; and

Re-establish the uniform application of copyright law for songwriters, music publishers and music users.

I. ONLY THIS COURT CAN RESOLVE THE CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION AND PRECEDENT, CONGRESSIONAL INTENT, AND THE STATUTORY LANGUAGE.

Since its inception, the Section 110(5) exemption has been consistently construed and applied on the basis of the infringer's activities as a whole.

The Seventh Circuit's judgment radically departs from this unbroken line of precedent.[3] Its expansive interpretation goes far beyond every prior decision interpreting Section 110(5), the legislative history and the express language of the exemption. What had been a limited exemption for small "mom and pop" commercial establishments has been expanded by the Seventh Circuit into a free ride allowing multimillion dollar corporations to circumvent the copyright laws.

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[2]In *Edison Brothers' Stores, Inc. v. Broadcast Music, Inc.*, No. 91-2115 (8th Cir. Jan. 13, 1992), the Eighth Circuit followed *Claire's* holding that a national retail operation of more than 2,000 stores was also exempt from copyright licensing under Section 110(5). BMI is concurrently filing a petition for a writ of certiorari in that case.

[3]*Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113 (M.D.N.C. 1985) is the only prior case that found a music user to be eligible for the Section 110(5) exemption. Plaintiff in that case, however, chose to treat the receiver operated on the miniature golf course separately from the receiver operated in the larger establishment, *i.e.*, the roller rink. The court indicated that it probably would have denied the exemption had plaintiff sought to hold the business as a whole liable. *Id.* at 1119 n.6.

A. The Seventh Circuit's Decision Conflicts With The Holdings Of Other Circuits And District Courts.

The Seventh Circuit's decision conflicts with every previous decision interpreting Section 110(5) that looked at the defendant's ability to pay license fees. Once the magnitude of the alleged infringer's business activities and use of music was established as substantial, the exemption was deemed inapplicable.

For example, in *Sailor Music v. The Gap Stores, Inc.*, 516 F. Supp. 923 (S.D.N.Y. 1981), *aff'd per curiam*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982), the first fact which the district court found relevant to its analysis was that The Gap was a chain of approximately 420 stores with revenues of nearly $300,000,000, even though the specific infringements were alleged to have occurred at only two locations. In denying the exemption, the district court declared that "it is clear that Congress did not intend to exempt establishments such as The Gap." 516 F. Supp. at 925. The district court analyzed the defendant's activities as a whole and recognized that such chain store operations were beyond the scope of the Section 110(5) exemption. The Second Circuit likewise examined characteristics common to The Gap as a whole—as a single entity. It did not apply the exemption to each receiver, or each specific location, in isolation. 668 F.2d at 85-86.

Similarly, *Broadcast Music, Inc. v. United States Shoe Corp.*, 211 U.S.P.Q. 43 (C.D. Cal. 1980), *aff'd* 678 F.2d 816 (9th Cir. 1982), treated the 600 stores of the Casual Corner retail clothing chain as a whole, although the alleged infringements occurred in only three stores. Indeed, the Ninth Circuit affirmed the district court's permanent injunction against "the public performance in *any* Casual Corner store of any musical composition which appears in the BMI repertoire and as to which BMI has the right to license the public performance." 211 U.S.P.Q. at 45, *aff'd*, 678 F.2d at 817 (emphasis added). The Ninth Circuit held that the "size and na-

ture of the operation" precluded the application of the Section 110(5) exemption to the Casual Corner chain. 678 F.2d at 817.

Prior district court decisions have also examined the application of the exemption on a defendant-as-a-whole basis. In *Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. 1172 (W.D. Tex. 1988), the court focused on common characteristics of the alleged infringer as a whole (a chain of 43 stores with annual revenues of approximately $500,000 per store), such as the chain's gross revenues, its uniform installation of receiving apparatuses and the fact that the chain operation was " 'of a sufficient size to justify, as a practical matter, a subscription to a commercial background music service.' " *Id.* at 1174, 1176. The court held that the entity as a whole did not qualify for the Section 110(5) exemption, not just the two stores where the infringements occurred. *Id.* at 1176.

In *Lamminations Music v. P & X Markets, Inc.*, 1985 Copyright L. Dec. (CCH) 19,555, ¶ 24,790 (N.D. Cal. 1985), the court found that the Section 110(5) exemption did not apply to the defendant chain store operation as a whole, and did not look at the individual stores where the infringements occurred in isolation. *Id.* at 19,556. In addition, the court permanently enjoined the entire chain from publicly performing music without a license. *Id.* at 19,557.

Furthermore, in *Rodgers v. Eighty Four Lumber Co.*, 617 F. Supp. 1021, 1023 (W.D. Pa. 1985), the court examined characteristics of the chain store operation in general. The court considered the chain's corporate policy of playing radio broadcasts as well as its central purchasing of sound equipment as factors in determining the inapplicability of the Section 110(5) exemption.

It is apparent that the Seventh Circuit's decision conflicts with the common conclusion of the prior decisions, *i.e.*, that the application of the Section 110(5) exemption must be ana-

lyzed by considering the size of the entire operation of the alleged infringer. Prior courts have consistently held that the exemption is only available to a small business.

B. The Seventh Circuit's Holding Conflicts With Congressional Intent.

1. Congress Intended That The Section 110(5) Exemption Would Only Apply To Small Businesses.

Congress said that the intent of Section 110(5) was to exempt small businesses.

> It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp. v. Aiken* . . . and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt.

H.R. Conf. Rep., No. 1733, 94th Cong., 2d Sess., 75, *reprinted in* U.S.C.C.A.N. 5810, 5816.[4] The legislative history states that the Section 110(5) exemption applies solely to businesses "whose *proprietors* merely bring onto their premises standard radio or television equipment." H.R. Rep., No. 1476, 94th Cong., 2d Sess., 87, U.S.C.C.A.N. 5659, 5701 (emphasis added) (hereinafter referred to as "House Report"). A "proprietor" is "one who has the legal right or exclusive title to property or a business, usually a business owned and controlled exclusively by one person." App. 13a (citing Black's Law Dictionary 1220 (6th ed. 1990)). Congress' use of "proprietor" further emphasizes that it intended the Section 110(5) exemption to apply only to small, single-store establishments.

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[4]In *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), this Court held that a small fast-food restaurant where the sole proprietor turned on the radio was not responsible for obtaining permission for the use of music on his premises.

Ironically, the Seventh Circuit did not dispute this. It acknowledged that Congress' intent was to limit Section 110(5) to small businesses. It noted the importance of Congress' use of the word proprietor, and agreed that Congress "only considered companies with one location or storefront" as the potential beneficiaries of the Section 110(5) exemption. App. 13a.

> Congress thought it unfair to impose liability on unsuspecting small business persons . . . [and] that it was impractical to require small organizations to enter into licensing agreements with performing rights organizations.

App. 11a. This is consistent with the Seventh Circuit's prior decision in *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652, 657-58 (N.D. Ill. 1987), *aff'd*, 855 F.2d 375, 378 (7th Cir. 1988), where it affirmed the district court's holding that a defendant must be a "small commercial establishment" for the Section 110(5) exemption to apply. The Seventh Circuit there emphasized that failure of the small business test serves as an independent basis for denying the exemption. 855 F.2d at 378.[5]

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[5]Many other cases have also acknowledged that failure of the "small business" or "commercial background music service" test represents an independent ground for denying the exemption. *See Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1037 (D. Mont. 1990) (being a small commercial establishment represents one of the "three basic elements" that a defendant must satisfy to qualify for the Section 110(5) exemption); *U.S. Songs v. Downside Lenox, Inc.*, 771 F. Supp. 1220, 1227 (N.D. Ga. 1991) (it is "well-established law" that a defendant must be a small commercial establishment in order to qualify for the Section 110(5) exemption); *Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. 1172, 1175-76 (W.D. Tex. 1988) (failure of the commercial background music service test represents an independent reason for denying the Section 110(5) exemption); *Gnossos Music v. DiPompo*, 13 U.S.P.Q.2d 1539, 1542 (D. Maine 1989) (denying the exemption where defendant was held not to be a small commercial establishment). Further, many other courts have relied upon at least one of these tests to find the Section 110(5) exemption inapplicable. *See,*

(Footnote continued on following page)

But in this case, the Seventh Circuit repudiated this Congressional intent and extended the Section 110(5) exemption beyond small businesses to a multimillion dollar chain store operation. By doing an about-face and striking down the "small business" and "commercial background music service" tests for denying the Section 110(5) exemption, the Seventh Circuit diminished the public performance rights granted by Congress to copyright owners. Commercial establishments in the Seventh Circuit may now believe that they can exploit copyrighted music with impunity. This result could not possibly be the intent of Congress in enacting the Copyright Act.

Congress intended the exemption to be limited to small businesses. The Seventh Circuit's decision contrary to that intent should be reviewed.

2. The Seventh Circuit's Holding Conflicts With Congress' Intent To Expand Coverage Of Copyright Protection.

Congress intended to expand the coverage of copyright protection with its enactment of the 1976 Copyright Act. The term of a maximum of copyright protection was dramatically increased from 56 years to life of the author plus 50 years. Congress eliminated the "for profit" limitation of the 1909 Act, for example, because many non-profit organizations are "highly subsidized and capable of paying royalties." *Almo Music Corp. v. 77 East Adams, Inc.*, 647 F. Supp. 123, 125 (N.D. Ill. 1986). Congress further expanded copyright protection by expanding the definition of performance to include radio transmissions.

(Footnote continued from previous page)
e.g., Merrill v. County Stores, Inc., 669 F. Supp. 1164, 1169 (D.N.H. 1987); *Lamminations Music v. P & X Markets, Inc.*, 1985 Copyright L. Dec. (CCH) 19,555, ¶ 25,790 (N.D. Cal. 1985); *Sailor Music v. The Gap Stores, Inc.*, 516 F. Supp 923 (S.D.N.Y. 1981), *aff'd per curiam*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982).

Section 110(5) is a limited exception to the broad protection afforded by the Copyright Act. Given Congress' intent to expand copyright protection, this limited exemption granted in Section 110(5) must be strictly construed.

The Seventh Circuit's analysis completely disregards Congress' intent. It expands the scope of the Section 110(5) exemption, and correspondingly narrows the scope of copyright protection afforded to authors of musical works. Thus, the Seventh Circuit's decision conflicts with virtually every prior decision, and is contrary to express Congressional intent in enacting Section 110(5) and in broadening the coverage of copyright protection. It should be reviewed.

3. The Consequences Of The Seventh Circuit's Broadening Of The Section 110(5) Exemption Are Significant.

The Seventh Circuit's decision changes federal copyright law in Illinois, Indiana, and Wisconsin (as does the follow-on judgment in *Edison Brothers' Stores*[6] for Missouri, Arkansas, Iowa, Minnesota, Nebraska, North Dakota and South Dakota), not only for Petitioners but for all copyright owners and music users. No basis exists for treating music use in these ten Midwest states differently than the rest of the nation. If these decisions stand, copyright owners and users now will have to alter their behavior in one-fifth of the United States.[7] Was the Copyright Act intended to be applied differently in different regions? Absent a grant of the writ of certiorari, such confusion will continue.

C. The Seventh Circuit's Judgment Conflicts With The Statutory Language And Context Of Section 110(5).

The Section 110(5) exemption is expressly limited to the use of "a single receiving apparatus." The Seventh Circuit

[6] *See supra* n.2.

[7] For example, a defendant's activities will be found exempt or not exempt depending upon where a lawsuit may be filed. Therefore, Claire's stores in New Jersey and California may be exempt while The Gap and Casual Corner stores in the same jurisdictions are not.

extended this exemption to the simultaneous use of hundreds of receiving apparatuses by construing the exemption as applying to each receiving apparatus in isolation, rather than to the alleged infringer's overall use of receiving apparatuses to publicly receive copyrighted music.

The Seventh Circuit's logic is faulty. By analyzing each receiving apparatus in isolation, *a fortiori*, the "single receiving apparatus" requirement will almost always be met. Very few, if any, retail establishments would use two receivers to receive the same transmission at the same location. Why even include the "single receiving apparatus" limitation if you are going to analyze each receiver on a one-by-one basis? The notion that Congress included this independent requirement in Section 110(5) "to foreclose the unlicensed playing of more than one receiver at a single geographic site" (App. 15a) makes no sense.

Therefore, the Seventh Circuit's decision is based on an erroneous premise and eradicates an express requirement of Section 110(5). The court's assertion that single means per location at the very least points out the ambiguity in the language of the statute, and thereby requiring an analysis of legislative history. It also lessens the right of songwriters and other copyright owners to be compensated for public performances of their copyrighted music.

1. The Seventh Circuit's "Broadcaster" And "Minimal Benefits" Tests Conflict With The Express Language Of The Copyright Act.

Prior to the Seventh Circuit's decision, to recover for copyright infringement a music copyright owner needed to prove only ownership and unauthorized public performance. To be entitled to an exemption from liability, the infringer always has the burden of proving that its activities come within the scope of the exemption. *Broadcast Music, Inc. v. Hartmarx Corp.*, 1989 WL 121290 (N.D. Ill., Oct. 5, 1989). But now, in the Seventh Circuit, this allocation of the burden of proof has been radically changed. Under the circuit court's decision, the copyright owner now bears the burden of proving

that a music user is not entitled to the Section 110(5) exemption. In ruling on how Section 110(5) should be interpreted, the Seventh Circuit imposed two new burdens on copyright owners. The decision requires that a copyright owner must now establish that a music user is (1) acting like a broadcaster and (2) receiving more than minimal benefits from the infringement. App. 14a-15a & n.10.

The Seventh Circuit's "broadcaster" test requires copyright owners to prove either that the owner initiated the broadcast or told its managers to tune to a particular station. App. 14a. The Seventh Circuit's "minimal benefits" test requires copyright owners to prove that individual store managers receive more than minimal benefits from playing radio broadcasts in order to remove their use from the exemption granted by Section 110(5). App. 15a. It is obvious that Claire's, by playing the radio in its stores, received a benefit. Evidently, Claire's must have believed that playing the radio would substantially benefit its operation or it would not have bothered to purchase radio equipment and have it professionally installed in all of its stores. In any event, to require proof of the extent of the benefit, is extremely difficult, if not impossible. There is no objective way to measure the test created by the Seventh Circuit.

Furthermore, no support exists for these two new tests. They are not based on the statute, and no prior case has ever referred to them. By creating them, the Seventh Circuit has expanded the applicability of the Section 110(5) exemption by imposing on copyright owners the burden of proving that the exemption does not apply. Making the copyright owner prove that the exemption does not apply goes far beyond what Congress had in mind in balancing the rights of copyright owners with small music users.

2. The Section 110(5) Exemption Is Expressly Limited To The Use Of One Receiving Apparatus.

Section 110(5) states that it applies only to the use of a "single receiving apparatus." 17 U.S.C. § 110(5). Congress

did not say a "single receiving apparatus at a single geographic site." Congress' silence on this issue cannot be construed to mean what the Seventh Circuit concluded. As this Court has said: " 'Congress' silence is just that—silence.' " *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)). Congress said how many receiving apparatuses may be used to be entitled to the Section 110(5) exemption—"a single receiving apparatus." Congress meant just what it said. And if there is any doubt as to what Congress meant, the legislative history makes it perfectly clear that substantial users such as Claire's were *not* meant to qualify for the exemption.[8]

Under the Seventh Circuit's reading of the statute, the Section 110(5) exemption could be interpreted to exempt everything but the use of multiple receiving apparatuses operating next to one another, in one store. It is unlikely that anyone would ever do this. Therefore, the Seventh Circuit's "construction" of the statute is based on a faulty premise—*i.e.*, that Congress was trying to prevent what no one would ever do. This is not, and cannot be, proper statutory construction.

3. The Seventh Circuit's Interpretation Of The Section 110(5) Exemption Is Inappropriate.

Before the *Claire's* decision, the "single receiving apparatus" language in Section 110(5) had not been expressly construed. According to the Seventh Circuit, Section 110(5) exempts the use of hundreds of receiving apparatuses by one user. Moreover, instead of the burden being on the alleged infringer to prove that the express conditions of the

[8]This court has examined the legislative history of various provisions of the Copyright Act in other cases where the statute was unclear as to Congress' intent. *See, e.g., Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985) and *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

Section 110(5) exemption are met, the Seventh Circuit's newly created tests shift to the copyright owner the burden of proving that the alleged infringer is acting like a "broadcaster" and receiving more than "minimal benefits" in order for the Section 110(5) exemption not to apply. This is the exact opposite of what the statute requires.

Section 110 provides exemptions from infringement liability only for persons who can prove that they meet the specifically delineated tests. These exceptions to the copyright owner's full enjoyment of his rights exist for public policy reasons. Thus, Section 110 exempts teaching activities, religious services, certain charitable activities, agricultural and horticultural fairs, promotion of the copyrighted work itself, performances by veteran or fraternal organizations and performances for the handicapped. None of these exemptions were intended to benefit large commercial enterprises, since there is no public policy reason for doing so.

Because Section 110 sets forth exemptions from the rights otherwise granted to copyright owners, it must be narrowly construed. *See Broadcast Music, Inc. v. Jeep Sales & Service Co.*, 747 F. Supp. 1190, 1193 (E.D. Va. 1990); Korman, *Performance Rights In Music Under Sections 110 and 118 of the 1976 Copyright Act*, 22 N.Y.L.S. Rev. 521, 534 (1977). As noted by the Tenth Circuit in connection with another exception in the 1909 Copyright Act in *Edward B. Marks Music Corporation v. Colorado Magnetics, Inc.*, 497 F.2d 285, 288 (10th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975):

> [W]e note that we are here concerned with a proviso or exception to the statute vesting a copyright interest in the composer of a musical composition and granting him the exclusive right to determine the use to be made of his copyrighted composition. In this regard, it is the general rule that a proviso should be strictly construed to the end that an exception does not devour the general policy which the law may embody. *Shilkret v. Musicraft Records, Inc.*, 131 F.2d 929 (2d Cir. 1942), *cert. denied*, 319 U.S. 742 . . . (1943).

Neither the language nor the structure of Section 110 support construing Section 110(5) as permitting the use of more than "a single receiving apparatus" or as requiring the copyright owner to prove that an infringer is not entitled to the exemption (because it is operating multiple receiving apparatuses in a single location, is acting like a broadcaster, and is receiving more than minimal benefits). The Seventh Circuit's expansion of the Section 110(5) exemption, and corresponding erosion of the public performance rights previously granted to authors, should be reviewed.

II. THE SEVENTH CIRCUIT'S DEFINITION OF FURTHER TRANSMISSION MARKS A RADICAL DEPARTURE FROM AN UNBROKEN LINE OF PRECEDENT.

According to Section 110(5), the exemption does not apply if the performance is "further transmitted" to the public. The receivers in Claire's stores are placed in a room separate and distinct from the selling area of the store where the loudspeakers are located. The Seventh Circuit ignored the prior case law in holding that this does not constitute further transmission.

The Seventh Circuit's decision rejected all precedent and concluded that "further transmission" occurs only when "some device or process . . . expands the normal limits of the receiver's capabilities." App. 24a. This contradicts the express language of the Copyright Act, all precedent, and the legislative history of Section 110(5).

A. The Seventh Circuit's Definition Of Further Transmission Conflicts With The Express Language Of The Statute.

The Copyright Act defines "to transmit" as:

> to communicate [a performance] by any device or process whereby . . . sounds are received beyond the place from which they are sent.

17 U.S.C. § 101. Therefore, "further transmission" means the communication of a performance beyond the place where it is initially received.

The Seventh Circuit rejected this definition, and substituted its own. According to the court, a further transmission must entail the use of "some device or process" that "expands the normal limits of the receiver's capabilities." App. 24a. The Seventh Circuit's definition of "further transmission" in terms of the receiver's capabilities, instead of what is done with the transmission after it is initially received, is unsound for at least two reasons.

First, the words "further transmission" focus on the transmission, not on the receiver. The definition of "further transmission" must therefore focus on what is done with the transmission after a receiver receives it, not on what the receiver does. The Seventh Circuit, however, created a new definition based on its concept that only a broadcaster can infringe.

Second, meeting the Seventh Circuit's definition of "further transmission" would necessarily mean that the receiver would no longer meet the "home-type" requirement. The Seventh Circuit said, but did not establish, that "it is conceivable that even a home-type component could further transmit under this approach. . . ." App. 24a. This cannot be so. The use of a "device or process" that "expands the normal [*i.e.*, home-type] limits of the receiver's capabilities" (App. 24a), expands a receiver beyond the home-type limit by definition. Because Section 110(5) explicitly sets forth the "further transmission" requirement as separate and distinct from the "home-type" requirement, they cannot mean the same thing.

The Seventh Circuit's definition merges these two independent criteria, and expands the applicability of Section 110(5) beyond the scope Congress intended.

B. Precedent Have Consistently Defined "Further Transmission" As Occurring When Speakers Are In A Separate Room From The Receiver.

An unbroken line of precedent holds that "further transmission" occurs when a radio broadcast is received in one room and then transmitted to another room.

For example, the Seventh Circuit affirmed such a holding in *Kowalczyk*:

> In the instant case, the physical layout of the [restaurant] and the positioning of defendant's receiving apparatus is decisive. The performances originated in defendant's private office which is located at one end of the [restaurant] and is completely separate from the public dining areas. Then, by concealed wiring, the defendant sent the broadcasts from his office to the [restaurant]'s coffee shop, dining room, and bar where the patrons heard the music. This is sufficient to constitute 'further transmission'. . . .

665 F. Supp. at 657, *aff'd*, 855 F.2d at 378.

Similarly, the court in *Bill Miller's Bar-B-Q* held that "the radio broadcasts received by defendants were 'further transmitted' to the public because the broadcasts were initially received in a room or area without speakers and were sent to a separate room with speakers via some 40 feet of wiring." 688 F. Supp. at 1176. *See also Gnossos Music v. DiPompo*, 13 U.S.P.Q.2d 1539, 1542 (D. Maine 1989) ("Finally, since the radio broadcasts received on the defendant's radio/cassette player located in the lobby were sent to the dining rooms over . . . speakers, they were transmissions 'further transmitted to the public' and, as such, outside the scope of the exemption.").

Furthermore, other courts even have found a "further transmission" in any dispersal of a radio broadcast through a commercial establishment. For example, in *Sailor Music*, the Second Circuit affirmed a holding that The Gap further transmitted broadcasts which it received on "radio receivers

and played via *recessed* loudspeakers." 516 F. Supp. at 925, *aff'd per curiam*, 668 F.2d 84 (emphasis added). Likewise, the court in *Hickory Grove Music v. Andrews* held that "[i]n the context of § 110(5), the courts have interpreted 'to further transmit' to mean any dispersal of sound from a point of reception through a restaurant or other establishment." 749 F. Supp. 1031, 1038 (D. Mont. 1990). *See also Hampshire House Publishing Corp. v. Sal and Sam's Restaurant, Inc.*, 1985 WL 9451 (E.D. La. 1985) ("The court further finds, as a matter of law, that the utilization of the remote speakers . . . amounts to the songs received being 'further transmitted to the public.' "); *U.S. Songs, Inc. v. Downside Lenox, Inc.*, 771 F. Supp. 1220, 1227 (N.D. Ga. 1991) (citing the language quoted above from *Andrews*).

Claire's activities fall squarely within these interpretations of "further transmission." In order to conclude that the store's activities here were not a further transmission, the Seventh Circuit was forced to disregard all precedent.

C. Contrary To The Seventh Circuit's Holding, The Definition Of Further Transmission Found In All Prior Cases Is Relevant.

The Seventh Circuit explains its disregard of all prior cases in a footnote (App. 24a-25a & n.14), arguing: "None of these cases relied *solely* on a finding of further transmission to support its holding." App. 25a n.14 (emphasis added).

However, the fact that two or more independent bases may exist for a decision does not render each basis irrelevant. According to the Seventh Circuit's reasoning, if there are two or more reasons for a decision then none of the reasons stand as precedent. On the contrary, each basis remains independent and stands as precedent for the decision.

Congress provided that failure to meet the "further transmission" requirement is an independent ground for denying the Section 110(5) exemption. The Seventh Circuit's merger of the "further transmission" requirement and the "home-

type" requirement contradicts Congress' intent to control the applicability of Section 110(5). Had Congress not intended the "further transmission" requirement to be a separate condition for application of the exemption, it would not have included it.

D. The Definition Mandated By The Statute And Followed By Precedent Finds Its Roots In Legislative History.

The legislative history confirms that the Section 110(5) exemption does not apply where a broadcast is "further transmitted beyond the place where the receiving apparatus is located." House Report at 87, *reprinted in*, 1976 U.S.C.C.A.N. at 5701. Congress adopted the holding of *Buck v. Jewell-LaSalle Realty*, 283 U.S. 191 (1931) under which "further transmission of a broadcast to the public[ ] is considered an infringing act." *Id.* In *Jewell-LaSalle*, this Court found that an infringing performance occurred within the meaning of the 1909 Copyright Act where radio broadcasts were received on a master receiver in one area of the hotel and transmitted to the guests' rooms. Although later Supreme Court cases modified this ruling, Congress expressly noted that this transmission from room to room would be infringing under Section 110(5). House Report at 87, *reprinted in* 1976 U.S.C.C.A.N. at 5701.

Thus, the language and the structure of the statute, all precedent, and the legislative history are consistent—communication of a transmission from one room to another constitutes a "further transmission" and negates the Section 110(5) exemption.

No other court has espoused the interpretation of "further transmission" created by the Seventh Circuit. Only in the Seventh Circuit can commercial establishments now avoid paying license fees for their transmission of copyrighted music from room to room. This anomaly should be corrected.

CONCLUSION

A writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit to resolve the conflict among the various federal courts, restore the copyright law to reflect Congress' intent, and re-establish the uniformity of copyright law for songwriters, music publishers and users of music throughout the United States.

Respectfully submitted,

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